such failure to use his senses—the location of the gates whether in a city or in the country, the presence or absence of traffic on the highway, the presence of obstructions or the presence of the gateman are all circumstances which might call for a reliance on the signal without resorting to other precautions; but where the evidence clearly showed that he could have seen the train had he used his senses the question was for the court as a matter of law. This last case seems to meet the situation satisfactorily since it allows no undue relaxation of vigilance but at the same time recognizes the psychological element—the apparent invitation—where it is a controlling motive in causing the traveler to cross. The distinction raised by the dissenting view in the principal case is a technical one but not a real one. It discovers a difference in causes but no difference in effects. Whether the controlling agency of the device is a human being or a contrivance is immaterial so long as it can be shown that the psychological effect may be the same—that the traveler thereby actually becomes "less cautious in looking for the coming of a train."

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—A employed B, an attorney at law, to represent him in certain actions in which he (A) was involved. As consideration for services rendered it was agreed that, on the final determination of the actions, A should turn over to B certain shares of stock. B performed the services, but A refused to carry out his part of the agreement. Bill by B for specific performance. Defense: want of mutuality of remedy. *Held*: Specific performance decreed. *Roche et al.* v. *Madar et al.*, (Wash. 1918) 175 Pac. 314.

Mutuality of remedy continues to raise its head with the persistence of Banquo's ghost. It would seem clear that it has no application to a unilateral contract nor to a bilateral contract fully performed on one side. While it is true that equity would not compel B to perform personal services for A, yet the authorities are practically unanimous that, when B has performed the services, he may compel A to perform. Such a result seems inevitable; for it would be most unjust if A who has already received the promised equivalent for his performance, were permitted to plead that he could not have compelled the performance he has received. Yet the uniformly unsuccessful attempts of parties in such a situation to resist performance indicate confusion in the minds of many lawyers as to the real meaning of mutuality. The final word on the subject has been spoken by Ames. Mutuality in Specific Performance, 3 Col. Law Rev. 1; Lectures on Legal History, 370. Cf. Pomeroy, Contracts (ed. 2) §§ 162-174.

TRESPASSING CHILD—LIABILITY FOR NEGLIGENCE TOWARD.—Defendant left his automobile standing at the proper place near the curb on a street, while he was gone about twenty minutees. On his return he found the plaintiff, a small boy about four and one-half years old, with several other small children, upon the right hand running board of his car, near the curb. They asked for a ride. Defendant refused this and drove them away. He then cranked his car, got in it on the left-hand side, noticing that the plaintiff was then on the left-hand running board. The car had a right-hand drive.

There was conflict in the testimony at this point, defendant claiming he had "shoved" plaintiff away a short distance before starting his car, and did not know he was on the running board at the time. Plaintiff's testimony was to the effect that he had remained on the running board, until he was thrown off by the starting of the car. Defendant asked the court to instruct the jury that he would be liable only if he knew plaintiff was on the running board when he started, and, after he drove him away (if the jury so found) he was under no further duty toward him for neglecting to investigate to find out if he was upon the running board. This request was denied. The court instructed that defendant was bound to know a child of such age might act upon a childish impulse, and if he was so close to the car, when it was started, and his conduct such as to lead a prudent man to believe he was about to jump upon the car, you have a right to inquire what ordinary care and prudence required of the defendant under the circumstances. Defendant excepted to this instruction. Judgment for the plaintiff by the trial court was reversed by the Court of Appeals, and this was reversed by the Supreme Court of Ohio. *Ziehm* v. *Vale* (Ohio, 1918), 120 N. E. 702.

The Court of Appeals relied upon two earlier cases, *Railroad Co.* v. *Harvey,* and *Swartz* v. *Akron Water Works Co.* (1907), 77 O. S. 235. The *Harvey* case was one in which a boy five or six years old was injured while swinging on an unenclosed, unlocked, and easily accessible railroad turntable, in a village where children were known to be in the habit of playing. The *Akron* case was one in which a small girl was drowned by falling into the water works reservoir situated on a high hill partly in the city, where people resorted frequently to enjoy the view,—the reservoir being surrounded by a picket fence three feet high, through a hole in which, due to the loss of two pickets, the small girl and two others climbed, and the former fell down the steep inside bank into deep water and was drowned. Judgments for plaintiffs in both cases were obtained which were reversed for error in overruling the defendants' motions for directed verdicts. "The distinction between the legal duty due uninvited persons, in cases arising from the construction of the premises, and in those arising from their negligent operation, is clearly made", according to the court, in *C. H. & D. R. R.* v. *Aller,* 64 O. S. 183, and is made the basis of the decision in the *Ziehm* case above. WANAMAKER, J., in concurring, registers a vigorous protest against the implied approval of the *Harvey* case, saying it astonished the profession, and indicated the high water mark of the court" in its effort to magnify property right and minimize personal right,—the right to life, limb, health, and safety—especially when applied to a child 4½ years of age." The distinction between *active* and *passive* negligence in similar cases, on which the *Ziehm* case is based, is fairly well established, but admittedly difficult of application. See *Fitzpatrick* v. *Glass Mfg. Co.* (1898), 61 N. J. L. 378, and *Gallagher* v. *Humphrey* (1862), 6 L. T. R., N. S. 684. The turntable cases are in hopeless conflict, as shown in the *Harvey* case where an effort is made to classify them.